IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 118

CAPITOL GREYHOUND LINES,
PENNSYLVANIA GREYHOUND LINES, INC.,
and RED STAR MOTOR COACHES, INC.,
Appellants,

vs.

ARTHUR H. BRICE,
COMMISSIONER OF MOTOR VEHICLES, STATE OF MARYLAND,
BALTIMORE, MARYLAND,
Appellee.

APPELLEE'S BRIEF

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STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

These are three appeals in one record from decrees of the Court of Appeals of Maryland reversing orders of the Superior Court of Baltimore City. The latter orders directed the issuance of writs of mandamus against the Appellee, the Commissioner of Motor Vehicles of the State of Maryland, commanding him (i) to accept Appellants' applications for certificates of title for certain public passenger motor vehicles, and (ii) to issue said certificates without the payment by Appellants of a tax in the amount of 2%

of the fair market value of each of said motor vehicles, which tax is provided for in Section 25(a) of Article 66½ of the 1947 Cumulative Supplement to the Annotated Code of Public General Laws of Maryland. Appellants are engaged in carrying passengers for hire in interstate commerce by passenger motor vehicles or buses over Maryland roads. This Court's jurisdiction is invoked under U. S. C. A. Title 28, Section 1257(2) upon the alleged ground that said 2% "titling tax", adjudged by the Court of Appeals of Maryland to be payable by Appellants as a condition precedent to the issuance of certificates of title for their buses which in turn is necessary to enable said buses to operate on Maryland highways, violates the "Commerce Clause" of Article 1, Section 3 of the United States Constitution.

STATEMENT OF THE CASE

These cases arise on the demurrers of the Appellee, Commissioner of Motor Vehicles of Maryland, to three petitions for mandamus, one of which was filed by each Appellant (R. 9-24). The allegations of fact (but not conclusions) made by the petitions are therefore to be taken as true. Substantially similar facts are presented in each of the three cases.

Each of the Appellants is a corporation qualified to do business in Maryland and each is engaged in the business of public transportation of passengers for hire by motor vehicle. As a part of their business, Appellants operate over routes located both within and without the State of Maryland. Each of the Appellants is engaged in interstate commerce, having obtained authority so to operate from the Interstate Commerce Commission (R. 9, 13, 17). The interstate operations here involved may be described gen-

erally as (a) the carrying of passengers from points within the State of Maryland to points outside the State; (b) the carrying of passengers from outside the State of Maryland to points within the State; and (c) the carrying of passengers from points outside the State of Maryland to other points outside the State on fixed routes which lie partly within and partly without the State (R. 10, 14, 18).

The Appellants, Capitol Greyhound Lines (hereinafter called "Capitol") and Red Star Motor Coaches, Inc. (hereinafter called "Red Star") have authority from the Public Service Commission of Maryland to transport passengers in intrastate commerce within this State (R. 13, 14). The Appellant, Pennsylvania Greyhound Lines, Inc. (hereinafter called "Greyhound") has no such authority (R. 10).

Since November 30, 1930, Capitol has operated a passenger bus line between Cincinnati, Ohio, and Washington, D. C., a distance of approximately four hundred and ninety-six miles, nine miles of which are over State, State-aided and improved county roads of Maryland. From October 1, 1946, to September 30, 1947, Capitol carried 406,572 passengers over the above described route, of which eleven passengers traveled exclusively in intrastate commerce within this State (R. 18).

Since April 25, 1940, Greyhound, together with its wholly owned subsidiary, Pennsylvania Greyhound Lines of Virginia, Inc., has operated a passenger bus line between Philadelphia, Pennsylvania, and Norfolk, Virginia, a distance of approximately two hundred and forty-five and three-tenths miles. Greyhound operates that portion of the aforesaid route which lies between Philadelphia, Pennsylvania, and the Maryland-Virginia State line, a distance of approximately one hundred seventy-two and six-tenths miles, of

which forty-one miles are over State, State-aided and improved county roads in Maryland. Greyhound transports no passengers exclusively in intrastate commerce within the State of Maryland during this period (R. 9-10).

Since 1938, Red Star has operated a passenger bus line between Rehoboth, Delaware, and Baltimore, Maryland, a distance of approximately one hundred and twenty miles, of which sixty-four miles are over State, State-aided and improved county roads in Maryland. From June 1, 1947, to November 1, 1947, Red Star carried 13,910 passengers over the above described route, of which 6,577 passengers traveled exclusively in intrastate commerce within this State[1] (R. 13-14).

On October 22, 1947, Greyhound purchased a public passenger motor vehicle at a cost of $29,002.60 (R. 10). On July 18, 1947, Red Star purchased a public passenger motor vehicle at a cost of $18,637.50 (R. 14). On July 18, 1947, Capitol purchased a public passenger motor vehicle at a cost of $25,258.70. Each Appellant proposed to operate its said vehicle over Maryland roads in accordance with its route described above. For this operation, each Appellant was duly granted a permit by the Public Service Commis-

[1] The Appellants maintain that the ratio of their earnings from purely intrastate business developed in this State to their total interstate business was disproportionate. For example, it is alleged that Greyhound produced total gross revenues over the routes described hereinabove from interstate business in an amount equal to $436,326.92, while it had no revenue from intrastate business in this State. Similar comparisons were as follows: Red Star earned a total of $21,087.18 from passengers carried over the routes described above, of which $11,324.41 was derived from passengers traveling in interstate commerce originating from or destined for points within the State of Maryland. Capitol produced a total of $3,695.80 from passengers traveling in interstate commerce originating from or destined for points within the State and produced a total of $3.25 in purely intrastate business. The periods of time for which these comparisons were made are those outlined in the text above (R. 10, 14, 18).

on of Maryland as required by Article 81, Section 218 of ne Maryland Annotated Code (1947 Supp.) (R. 10, 14, 8-19).

Thereafter each Appellant applied to the Department of Motor Vehicles of the State of Maryland for the issuance f a certificate of title for its said motor bus. These applica-ions were made on forms provided for that purpose by the Commissioner of Motor Vehicles and accompanied by the ermit obtained from the Public Service Commission, to-ether with the sum of $1.00. The Department of Motor Vehicles, acting under the instructions of the Commissioner f Motor Vehicles, refused to accept the Appellants' appli-ations (R. 11, 15, 19-20).

The basis for the action of the Department of Motor Vehicles in rejecting the Appellants' applications for cer-ificates of title was and is that the Appellants refused and ontinue to refuse to pay the tax imposed by Section 25A f Article 66½ of the Maryland Annotated Code (1947 Supp.) which is as follows:

> "(Excise Tax for the Issuance of Certificates of Title.) (a) In addition to the charges prescribed by this Article there is hereby levied and imposed an excise tax for the issuance of every original certificate of title for motor vehicles in this State and for the issuance of every subsequent certificate of title for motor vehicles in this State in the case of sales or resales thereof, and on and after July 1, 1947, the Department of Motor Vehicles shall collect said tax upon the issuance of every such certificate of title of a motor vehicle at the rate of two per centum of the fair market value of every motor vehicle for which such certificate of title is applied for and issued.
>
> "(b) The Department of Motor Vehicles shall require every applicant to supply information as it may deem necessary as to the time of purchase, the purchase price and other information relative to the determination of the fair market value.

"(c) The Department of Motor Vehicles shall remit all sums collected under the provisions of this section to the State Treasurer, who shall use and apply the same, first, to the extent required for debt service on State Highway Construction Bonds pursuant to Sections 147G to 147P, both inclusive, of Article 89B of the Annotated Code of Maryland (1939 Edition), as enacted by Section 18 of Chapter 560, Acts of 1947, and shall transfer the balance thereof, if any, to the construction fund for the State Roads Commission provided by Section 11(e) of said Article 89B.

"(d) Certificates of title for all motor vehicles owned by the State of Maryland or any political subdivision of the State and for fire engines and other fire department emergency apparatus, including ambulance operated by or in connection with any fire department, shall be exempt from the tax imposed by this section."

This tax (hereinafter called "titling tax") applies alike to all vehicles, both local and interstate. It's payment is a prerequisite to the issuance of a certificate of title, which in turn is necessary before the vehicle may be operated upon Maryland roads. Article 66½, Sections 21 and 22, Maryland Annotated Code (1947 Supp.). These statutes are set out in full in the Appendix to this Brief.

The tax would amount to $505.17 in the case of Capitol; to $580.00 in the case of Greyhound; and to $372.75 in the case of Red Star (R. 11, 15, 20).

It is not disputed that except for the payment of the titling tax, the Appellants have complied with all of the prerequisites necessary for the issuance of the certificates of title to their motor buses.

In addition to the constitutional argument, Appellants argued below that as a matter of construction the tax in dispute does not apply to them. The Maryland Court of Appeals rejected this argument and held that the tax is in

terms applicable (R. 33-34). The question before this Court is therefore limited to the constitutionality of the tax under the Commerce Clause. *Aero Mayflower Transit Co. v. Board of R. R. Commissioners*, 332 U. S. 495, 92 L. Ed. 99 (1947).

ARGUMENT

A.

General Statement of the Appellee's Position.

Article 1, Section 8, Clause 3 of the Federal Constitution (hereinafter referred to as the "Commerce Clause"), gives to the Congress of the United States the power "to regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes". In the present case, the Appellants contend that the Maryland titling tax, as applied to them, violates the commerce clause and is therefore invalid. The highest court of Maryland held otherwise (R. 24-35).

In determining the important constitutional question raised by this case, we respectfully urge this Court not to be misled by catch-word phrases or convenient labels. The time has long passed since constitutional questions were decided upon the basis of form. This case, we submit, must and should be decided with due regard to the substance of the matter at hand.[2]

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[2] Nomenclature has been rejected as the touchstone for decision in the great majority of cases dealing with the application of the commerce clause to taxes levied against interstate motor bus operators. An excellent example of this approach may be found in *State v. Oligney*, 162 Minn. 302; 202 N. W. 893 (1925), where the court, in sustaining a flat tax levied against interstate motor operators, said at page 307:

> "Whether we call the tax a property tax or a privilege tax, or both, is of no great consequence so far as this case is concerned. The tax cannot be escaped merely because defendant is a non-resident or because he uses his truck to transport goods in interstate commerce."

It is for this reason that we ask this Court at the very outset of our argument to put to one side the question of whether the impost laid by the Maryland titling tax can be classified as a tax, a fee or a license.[3] It matters not, we submit, what name or label is attached to the Maryland titling tax for in any event the substance of the situation is the same. This Court will readily see that the true substance in this case lies in the fact that an economic burden by way of a revenue raising measure has been laid upon an interstate carrier. The question for decision is, therefore, whether there is any governing principle by which the impact of that economic burden can be sustained consistent with the requirements of the commerce clause of the Federal Constitution.

We submit that the underlying and governing constitutional principles which control this case are as follows: (1) if a reasonable and non-discriminatory tax is affirmatively laid on motor vehicles engaged in interstate commerce for the privilege of using the State's highways, the tax is consistent with the requirements of the commerce clause and, therefore, constitutional; (2) if a tax is affirmatively laid on motor vehicles engaged in interstate commerce for the privilege of doing interstate business, the

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[3] Appellants have attempted to distinguish such cases as *Hendrick v. Maryland*, 235 U. S. 610, 59 L. Ed. 385 (1915) and *Morf v. Bingaman*, 298 U. S. 407, 80 L. Ed. 1245 (1936) from the present case on the grounds that the imposts with which the Supreme Court was concerned in those cases were mere "fees", while in the present case the Court was confronted with a "tax" or "revenue raising measure". In this connection, we call this Court's attention to the fact that the Supreme Court saw no basis for such a distinction in the recent case of *Acro Mayflower Transit Co. v. Board of Railroad Commissioners*, 332 U. S. 495, 92 L. Ed. 99 (1947), since both the *Hendrick* case and the *Morf* case were cited to sustain the constitutionality of the Montana gross revenue tax involved in that proceeding.

tax violates the provisions of the commerce clause and is, therefore, unconstitutional.

In the pages that follow, we will apply the basic principles set forth above to the facts in the present case. More particularly, our argument will be predicated upon the following premises which, we submit, are irrefutable:

(1) That a reasonable and non-discriminatory tax which is levied against motor vehicles engaged in interstate commerce is constitutional if it is laid *for the privilege of using the State's roads*. A tax is laid for the privilege of using the State's roads if *any one* of the following is present:

(a) the tax is actually allocated to road maintenance and construction; or,

(b) the Legislature has declared specifically that the tax is laid for the privilege of using the roads of the State; or,

(c) assuming that neither of the first two tests are met, if it appears from the relationship of the tax to the use of the roads that the tax is truly one on the privilege of using the roads.

(2) That the Maryland titling tax is levied for the privilege of using the roads because its proceeds are expressly and specifically allocated by statute to road construction and maintenance.

(3) That since the true nature of the Maryland titling tax is thus spelled out for all to read, it is immaterial whether or not the Legislature has said in so many words that the tax is for the privilege of road use. It is also immaterial that there is no precise measurable tie-in or relationship of the exaction and amount of the tax with the man-

ner or extent of the actual use of the roads by the particular taxpayer.

(4) That the Maryland titling tax is non-discriminatory and is reasonable in amount for the privilege of using the roads to such extent as the taxpayer may desire and be in a position to do.

Since the tax, under the decisions of this Court to which we will refer, is a tax on the privilege of using the roads because its proceeds are specifically dedicated to road maintenance and construction, the only remaining relevant inquiry is whether or not the tax is non-discriminatory and reasonable in amount. By reasonable in amount is meant (and the cases clearly so hold) not that the tax must be an exact or measurable quid pro quo for the actual mileage used by the taxpayer, but merely that the tax is not exorbitant or fantastic in amount for the privilege of using the roads as extensively as the taxpayer may desire. In other words, if there has been established, as is true in this case, that the tax is for the privilege of using the roads, the tax in order to be unreasonable in the legal sense would have to be, in effect, confiscatory.

Because the Appellants will attempt to refute the argument made above, mainly by projecting old and inapplicable cases wherein the tax was held to be on interstate commerce and not on the privilege of using the roads, it becomes necessary to analyze in detail many of the decisions of this Court which have dealt with the problem.

B.

The Maryland Titling Tax is Allocated to the Construction and Maintenance of the State Highways.

As stated in the first part of our brief, the Maryland titling tax is constitutional if it appears affirmatively that

the tax is laid on the privilege of using the State's highways and if the tax is reasonable in amount and non-discriminatory against interstate commerce. The first question for decision is, therefore, whether the tax is laid affirmatively upon the privilege of using the State highways. As will appear by the next section of our brief, we contend that the titling tax is laid upon the privilege of using the State highways because the proceeds of the levy are allocated for the use and maintenance of the State roads.

In order that this Court may see clearly the method by which the proceeds of the titling tax are allocated, a brief summary of the various provisions of the Annotated Code of Maryland bearing upon this question is in order.[4]

Section 218 of Article 81 of the Annotated Code of Maryland (1947 Supp.) provides that it shall be the duty of each owner of a motor vehicle used in the interstate transportation of passengers over State roads to secure permission so to operate from the Public Service Commission of Maryland. This Section further provides that the owner of such motor vehicle must present the permit received

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[4] The history of the titling tax is faithfully recited in the nisi prius court's opinion. In this connection, it is observed, in part (R. 2):

"The titling tax was first levied in Maryland in 1935 at the rate of one per cent. and the proceeds were paid into a special account in the State Treasury called the 'State Emergency Relief Fund'. Later the Act was amended to provide that the proceeds be paid into the 'State Fund for Aid to the Needy'. In 1939 the levy was increased to two per cent. and the proceeds were paid into the general funds of the State.

Chapter 560 of the Acts of 1947 made several important changes in the law. The tax was made applicable not only to original title certificates but to subsequent transfers. The proceeds were to be used for servicing the debt on State highway construction bonds, and the balance, if any, went to the construction fund of the State Roads Commission."

See also Court of Appeals' Opinion (R. 29).

from the Public Service Commission to the Commissioner of Motor Vehicles at the time and according to the methods prescribed by law for the making of application for registration tags.

Section 21 of Article 66½ of the Annotated Code of Maryland (1947 Supp.) provides, with certain exceptions not here material, that "*every motor vehicle*, trailer, and semi-trailer when driven or moved upon a highway shall be subject to the registration and *certificate of title provisions of this Article.*"

Section 22 of Article 66½ of the Annotated Code of Maryland (1947 Supp.) provides that "*every owner of a vehicle subject to registration hereunder* shall make application to the Department for the registration thereof and the *issuance of a certificate of title for such vehicle* upon the appropriate form or forms furnished by the Department". The Section further provides that the application shall bear the acknowledged signature of the owner written with pen and ink and shall contain certain additional information which is not material to this proceeding.

Section 25 of Article 66½ of the Annotated Code of Maryland (1947 Supp.) provides that upon registering a vehicle the Department of Motor Vehicles shall issue a registration card and a certificate of title after it has received, among other things, a registration fee of $1.00.

Section 25A of Article 66½ of the Annotated Code of Maryland (1947 Supp.) provides, as follows:

> "In addition to the charges prescribed by this Article there is hereby levied and imposed an excise tax for the issuance of every original certificate of title for motor vehicles in this State and for the issuance of every subsequent certificate of title for motor vehicles

in this State in the case of sales or resales thereof, and on and after July 1, 1947, the Department of Motor Vehicles shall collect said tax upon the issuance of every such certificate of title of a motor vehicle at the rate of two per centum of the fair market value of every motor vehicle for which such certificate of title is applied for and issued."

Sub-section (c) of Section 25A of Article 66½ of the Annotated Code of Maryland (1947 Supp.) provides that the Department of Motor Vehicles shall remit all sums collected under the titling tax to the State Treasurer, who shall use and apply the same, first, to the extent required for debt service on State highway construction bonds, pursuant to Sections 147G to 147P of Article 89B of the Annotated Code of Maryland (1947 Supp.). The sub-section further provides that the balance of the proceeds of the titling tax, if any, shall be allocated to the Construction Fund of the State Roads Commission, as provided by Section 11C of Article 89B.

Sections 147 G to 147 P of Article 89B of the Annotated Code of Maryland (1947 Supp.) provide for the general road construction program of this State which was inaugurated at the regular session of the General Assembly held in 1947.[5] Elaborate provisions for the issuance of State

[5] The transfer of the titling tax proceeds from General Funds to State Roads Funds was a part of the overall roads program recommended to the General Assembly in 1947 by the Governor. In this connection, the Governor stated, in part, in his Message on the Additional Revenue Requirements (See 1 House Journal (1947) p. 1235, at 1236; Senate Journal (1947) p. 973, 974):

"First of all, I propose that the 2% titling tax, which will average approximately $2,625,000 annually, be transferred from General Funds to State Road Commission Funds. There is widespread feeling that since this money is collected from the motorist, it should be used for road purposes. It is therefore a logical source for additional road funds. This proposal will necessitate, of course, additional taxation in the amount of $2,625,000 annually for general fund purposes."

road construction bonds are contained in these Sections. Moreover, the Sections provide for the method by which these bonds should be serviced. In general, this method includes the allocation of the proceeds of (1) the titling tax levied pursuant to the provisions of Section 25A of Article 66½, *supra*, and, (2), such amounts as may be necessary from the gasoline tax fund. In this respect, Section 147N of Article 89B, *supra*, provides as follows:

> "Until all of the bonds issued under the provisions of this sub-title shall be paid, the proceeds of the annual tax laid by this Section shall be set aside as received to the credit of a sinking fund for the payment of the principal of and the interest on such bonds until the amount held for the credit of said sinking fund shall be equal to the amount required for the payment of the principal of and the interest on the bonds then outstanding which will become payable in the current year and in the next succeeding fiscal year. The proceeds of the taxes laid under the provisions of this section are hereby irrevocably pledged to the payment of the principal of and the interest on such bonds as the same shall become due and payable and such taxes, to the extent hereby required, shall not be repealed, diminished or applied to any other object until such bonds shall be fully paid."

It thus appears, as the Maryland Courts found (R. 3, 29), that the proceeds of the titling tax are allocated directly to the construction and maintenance of the roads of this State. Indeed, we do not understand the Appellants to contradict this assertion. The question which naturally arises, therefore, is what legal effect this fact has on the case at bar. This matter is treated in the following section of our brief.

C.

A Tax on Interstate Motor Carriers Allocated to State Highway Funds Is An Imposition on the Privilege of Using the State Roads.

As stated in the first section of our brief, the substantive question here presented is whether the titling tax is imposed upon the privilege of using State roads. If this Court finds (as the Court of Appeals of Maryland found, R. 29) that the incidence of the tax here in question is based upon the privilege of using the State roads, then, we submit, the levy must be held to be constitutional if it is found to be reasonable in amount and non-discriminatory against interstate commerce.

The question arises, therefore, how can it be shown that a tax imposed upon motor vehicles operating in interstate commerce is levied for the privilege of using the State roads. This may be proved by showing the existence of *any one* of the following situations:

(1) That the proceeds of the levy are allocated to the construction or maintenance of the State roads, or

(2) that the Legislature has made a formal statement to the effect that the tax is levied in consideration of the use of the State's highways,[6] or

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[6] Though there is no such express legislative statement here, the highest Court of Maryland held that the tax is for the privilege of using State roads (R. 29). It therefore appears that the effect of such formal statement has been supplied by the Maryland Court's construction of a Maryland statute, which in turn is binding on this Court. *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 92 L. Ed. 1832 (1948); *Aero Mayflower Transit Co. v. Board of Railroad Commissioners of Montana*, 332 U. S. 495, 92 L. Ed. 99 (1947). If so, our argument need go no further than to show that the tax is reasonable and non-discriminatory.

(3) from considering the tax in its entirety and determining whether the levy bears a reasonable relationship to the use of the State roads.

We have demonstrated heretofore that the proceeds of the Maryland titling tax are allocated to the construction and maintenance of the roads of this State. We have advanced the argument in this part of our brief that a tax will be considered as levied upon the privilege of using the State roads if the proceeds of that levy are allocated to road funds. The cases discussed below conclusively sustain the accuracy of this last statement.

In the recent case of *Aero Mayflower Transit Co. v. Board of Railroad Commissioners*, 332 U. S. 495, 92 L. Ed. 99 (1947), this Court had before it two flat taxes imposed under the laws of Montana. It was expressly held that the taxes there levied were imposed upon the privilege of using the State roads since the Montana Legislature had stated in the preamble of taxing measures that they were laid "in consideration of the use of the highways of this State." In reaching its conclusion, however, the opinion stated that if doubt existed on the question whether the taxes were levied upon the privilege of using the State roads, recourse could have been had to the purposes for which such taxes were put. In this connection, it was said at page 505:

> "Whether the proceeds of a tax are used or required to be used for highway maintenance 'may be of significance', as the Court has said, 'when the point is otherwise in doubt, to show that the fee is in fact laid for that purpose and is thus a charge for the privilege of using the highways'."

In making the statement quoted above, this Court was merely reiterating a rule which had been well established for many years. For example, in *Ingels v. Morf*, 300 U. S. 290, 81 L. Ed. 653 (1937), the Court held that the California

"caravan" act was invalid. In reaching this result, the Court was careful to point out that the tax was not imposed for the privilege of using the State roads. In this connection, the Court said at page 294:

> "To justify the exaction by a State of money payments burdening interstate commerce, it must affirmatively appear that it is demanded as reimbursement for the expenses of providing facilities or of enforcing regulations of the commerce which are within its constitutional power (citations omitted). This may appear from the statute itself (citations omitted), *or from the use of the money collected, to defray such expenses.*" (Italics supplied.)

That an allocation of the proceeds of a tax levied against interstate motor carriers to highways funds would be conclusive of the fact that the tax was levied for the privilege of using the State roads is made apparent by the decision of *Morf v. Bingaman*, 298 U. S. 407, 80 L. Ed. 1245 (1936). In that case, this Court sustained the constitutionality of the New Mexico Caravan Act against the contention that the tax violated the commerce clause of the Federal Constitution. In deciding that the tax there involved was imposed for the privilege of using the highways of the State, the Court said at page 412:

> "The use for highway maintenance of a fee collected from automobile owners may be of significance, when the point is otherwise in doubt, to show that the fee is in fact laid for that purpose *and is thus a charge for the privilege of using the highways of the State.*" (Italics supplied.)

In *Interstate Transit, Inc. v. Lindsey*, 283 U. S. 183, 75 L. Ed. 953 (1931), the Supreme Court declared unconstitutional a Tennessee act which imposed a privilege tax graduated according to the carrying capacity of motor vehicles operating in interstate commerce. In that case, the Court

could find no evidence of the fact that the tax was levied for the privilege of using the highways of the State and, therefore, expressly held that the tax was imposed against the forbidden purpose, i.e., the privilege of doing interstate business. In enunciating the various tests which should be considered in determining whether a tax was laid for the privilege of using the highways of the State, the Supreme Court said at page 186:

> "As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears, affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expenses of regulating motor traffic. *This may be indicated* by the nature of the imposition, such as mileage tax directly in proportion to use (citation omitted) or *by the express allocation of the proceeds of the tax to highway purposes* * * *." (Italics supplied.)

It thus appears that the Supreme Court in an unbroken line of decisions has declared expressly that the allocation of a motor vehicle tax to highway funds will conclusively answer the question of whether that tax is imposed for the privilege of using State highways. We have found no case and we submit that no case has been decided which in anyway refutes this principle. Moreover, the Governor of Maryland, in explaining to the General Assembly the reason for allocating the proceeds of the titling tax to State roads funds, declared that the step was taken in order "to meet the requirements of the highway situation" and to alleviate "one of the most inadequate highway systems in the country".[7] Since the proceeds of the Maryland titling

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[7] In his Message to the General Assembly on the State Highway System, delivered March 6, 1947, the Governor said, in part, (1 House Journal (1947) p. 1681, 1682):

"After intensive studies which have been made by and for me for more than a year, starting shortly after I announced my candi-

tax are expressly allocated to road construction and maintenance, it must follow that the tax in question is, in legal theory, expressly levied for the privilege of using the highways of this State.

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dacy for the office of Governor, I am convinced that, in order to meet the requirements of the highway situation, it is necessary to provide for additional projects to be financed, exclusively by tolls, to increase the present gasoline taxes from four to five cents per gallon, to make the increases in license fees substantially as provided in Senate Bill No. 104, to allocate all motor vehicle titling tax fees, now part of the general funds of the State, to the State Roads Commission for construction purposes, and to provide for the support of the State Police Department out of the State's general funds, instead of revenues from the operation of motor vehicles, as at present. * * *

"There was a time when Maryland boasted one of the best highway systems in the country. That was about thirty years ago. Since then the vast increase in motor vehicle traffic, and the improvement and changes in the speed, size and efficiency of commercial vehicles have so greatly altered the character of the highways required to carry passengers and freight that the design and even the materials used comparatively recently have now become obsolete. We are compelled to admit that Maryland has failed to meet present-day highway requirements. Its roads, except in a few instances, are too narrow for safety; the routes are winding, and therefore time-consuming, and various classes of traffic are lumped together, so that many roads are overloaded and incapable of properly servicing the traffic that is part and parcel of life in America today. From having one of the best highway systems, we have fallen back until today we have, I regret to say, one of the most inadequate highway systems. * * *

"* * * *Among other things I have tried to do is to frame the new legislation so as to assure all highway users that the revenues charged them for using the highways shall be dedicated and used for highway purposes, and for no other purposes.* It is for that reason that I propose to finance the State Police Department out of general revenues, and to lift the burden of this cost from highway funds." (Italics supplied.)

D.

A Reasonable and Non-discriminatory Tax Imposed Upon the Privilege of Using the State Roads is Constitutional Regardless of Whether the Amount of the Tax has any Specific Relationship to the Extent of Road Use.

In the preceding sections of this brief, we have shown that the Maryland titling tax is levied as compensation for and upon the privilege of using the highways of this State.

The question next presented is, therefore, assuming that the tax is levied upon the privilege of using the State highways, must it be shown, in addition, that the tax is geared to or has a relationship to road use before the constitutionality of the levy can be sustained?

The Superior Court of Baltimore City (the nisi prius court in this case) thought and acted upon the premise that since the tax was levied upon motor vehicles engaged in interstate commerce its amount must bear some measurable relationship to actual use of the roads by the taxpayer. Finding that the Maryland titling tax was a flat levy and not geared or proportioned with exactness to any phase of road use, the Superior Court held it to be unconstitutional (R. 1-8). This holding completely overlooked the basic and controlling fact that if the tax is one on the privilege of using the roads, as this Court has said it is if its proceeds are allocated to road construction and maintenance, the only inquiry is whether or not the tax is nondiscriminatory and reasonable in amount. If the tax is a privilege tax on road use (and there can be no doubt that the Maryland tax is since its proceeds are specifically allocated to road use), the only inquiry which need be made as to reasonableness is whether or not the tax is exorbitant, fantastic or confiscatory. It need not be a measurable or

exact quid pro quo for the manner and extent of actual road use.

We submit that the Superior Court's reasoning and result are entirely refuted by many decisions of this Court and are entirely fallacious, since they are based on a premise which is fundamentally unsound and overlooks the true nature of the tax here involved.

We further submit that the proper rule, which has been developed by all of the decisions of this Court, and was followed by the highest Court of Maryland (R. 24-33), is that a tax levied against motor vehicles engaged in interstate commerce *for the privilege of using the State roads* is valid and constitutional if that tax is reasonable in amount and non-discriminatory against interstate commerce. Put differently, we maintain that if a tax is imposed against an interstate motor bus carrier for the privilege of using the State roads, that tax, to be constitutional, need bear no specific relationship to road use. In such cases, the only test is whether the tax is reasonable in amount and non-discriminatory against interstate commerce.

A case directly in point with the theory which we have enunciated above is *Aero Mayflower Transit Co. v. Board of Railroad Commissioners*, 332 U. S. 495, 92 L. Ed. 99 (1947). As already stated it appeared in that case that the State of Montana levied in effect against interstate motor carriers two flat, non-discriminatory taxes, one for $10.00, the other for $15.00, payable annually upon each vehicle operated on Montana highways. Each tax was declared expressly to be laid "in consideration of the use of the highways" of the State, but the proceeds of the levies were allocated to the State's general fund. The taxpayer, a nonresident corporation whose business was exclusively inter-

state, challenged the legislation upon the theory that the taxes were imposed upon the business of doing interstate commerce.

In its decision, the Supreme Court pointed out that there were two types of revenue measures which could be laid against interstate motor vehicles. On the one hand, the Court observed, there were taxes imposed upon the privilege of doing interstate business. This type of tax, the Court said, was invalid. The second type of tax mentioned by the Court was one affirmatively laid for the privilege of using the State highways. In discussing the constitutionality of such taxes, the Court said at page 503:

> "It is far too late to question that a state, consistently with the commerce clause, may lay upon motor vehicles engaged exclusively in interstate commerce, or upon those who own and so operate them, a fair and reasonable, non-discriminatory tax as compensation for the use of its highways."

The Court held specifically that the taxes in the *Aero Mayflower Transit Company* case were levied for the privilege of using the highways of the State. This result was reached since, as stated above, the State Legislature had manifested an intent to levy the taxes "in consideration of the use of the highways". Having found that the taxes were laid on a privilege permitted under the commerce clause (i.e., the privilege of using the State highways) the Court then turned its attention to whether the taxes were reasonable and non-discriminatory against interstate commerce. Finding that the levies were reasonable and non-discriminatory, the Supreme Court held them to be constitutional.

It thus appears that the *Aero Mayflower Transit Co.* case presents direct authority for sustaining the constitutionality of the Maryland titling tax. In the *Aero Mayflower*

Transit Co. case, the Supreme Court found that the Montana flat taxes were levied for the privilege of using the highways of the State. Similarly, since the proceeds of the Maryland titling tax are allocated to State highway purposes, it must follow that that tax, like the Montana levies, is imposed for the privilege of using the highways of the State.

In the *Aero Mayflower Transit Co.* case, the Supreme Court sustained two flat taxes imposed against interstate motor vehicle operations—taxes which were not geared to the actual use of the highways nor related to any indicia of that use. As pointed out above, the taxes in the reported case were sustained because they were laid for a proper purpose, i.e., the privilege of using the highways of the State and because they were neither unreasonable nor discriminatory.

In the case at bar, this Court has before it a flat tax which is levied on the privilege of using the highways of this State. We submit that this Court should find the Maryland titling tax constitutional if it determines that it is reasonable in amount and non-discriminatory against interstate commerce. We further maintain that in reaching this decision this Court should hold (as did the Supreme Court in the *Aero Mayflower Transit Co.* case) that the fact that the amount of the Maryland titling tax has no relationship to the extent of the use of the State roads is completely immaterial.

Morf v. Bingaman, 298 U. S. 407, 80 L. Ed. 1245 (1936), illustrates the rule that a tax which is laid for the privilege of using the highways of the State will be sustained if the amount of the tax is reasonable and if the levy is non-discriminatory, it being immaterial that such taxes have no direct relationship to the use of the State roads. In the reported case, it appeared that by Chapter 56 of the New

Mexico Session Laws of 1935, the State denied to all persons the use of its highways for transportation of any motor vehicle on its own wheels for the purpose of selling or offering such vehicle for sale unless the vehicle was (1) licensed by the State, or (2) owned by a licensed automobile dealer and operated under a dealer's license, or (3) operated under a special permit issued by the State. The statute further provided that the permit for such operations would cost $7.50 if the vehicle was transported by its own power and $5.00 if the vehicle was towed or drawn by another.

As explained in the preceding section of our brief, the Supreme Court, in *Morf v. Bingaman, supra*, expressly decided that the tax in question was levied for the privilege of using the State roads since a portion of the fees collected were devoted directly to highway maintenance. Having concluded that the tax was laid for a proper purpose, i.e., the privilege of using the highways of the State, the Court concluded that the exaction would be sustained if it could be found that it was fair and reasonable in amount and nondiscriminatory. In this connection, the Court said at page 412:

> "As the tax is not on the use of the highways but on the privilege of using them, without specific limitation as to mileage, *the levy of a flat fee not shown to be unreasonable in amount, rather than a fee based on mileage, is not a forbidden burden on interstate commerce.*" (Italics supplied.)

It thus appears that in *Morf v. Bingaman, supra*, the Supreme Court sustained a flat tax levied against interstate motor vehicles regardless of the fact that the amount of the tax was unrelated to the extent of road use. This result was reached because the tax was found to be imposed upon a proper purpose consistent with the commerce clause, i.e. the privilege of using the State roads, and because the

tax was reasonable in amount and non-discriminatory. We submit that in the present case this Court should find that the Maryland titling tax is imposed upon the privilege of using the State roads and that it should, therefore, declare the tax to be constitutional regardless of the fact that the levy is not geared to the extent of use of the roads.

Dixie Ohio Express Co. v. Commission, 306 U. S. 72, 83 L. Ed. 495 (1939), illustrates the rule that a fair and non-discriminatory tax laid against interstate motor vehicle operators will be sustained if that tax is levied for the privilege of using State roads. In the cited case, it appeared that an Ohio corporation, which engaged exclusively in interstate transportation as a common carrier of property for hire by motor vehicles, held a certificate of convenience and necessity issued by the Interstate Commerce Commission, authorizing it to carry goods through Georgia. It further appeared that the Georgia maintenance tax imposed a levy on all carriers at rates which varied according to the type and weight of the vehicles used. By a specific act of the Legislature, the proceeds of the tax were allocated to the United States rural post roads in Georgia which the opinion makes it clear, were roads over which the taxpayer did not travel at all.

In a suit to test the validity of the Georgia maintenance tax, the taxpayer contended that the levy was an unreasonable and unconstitutional burden upon interstate commerce. The Supreme Court, however, sustained the tax. In so doing, the Court first turned its attention to whether the tax in question was laid (1) upon the privilege of engaging in interstate commerce, or (2) upon the privilege of using the State roads. Having expressly held that the tax in question was levied upon the privilege of using the highways of the State, the Supreme Court held that the levy would be constitutional if it were found to be reason-

able in amount and non-discriminatory. Said the Court at page 76:

> "But, consistently with the commerce clause, a State may impose upon vehicles used exclusively for interstate transportation a fair and reasonable tax as compensation for the privilege of using its highways for that purpose."

In the *Dixie Ohio Express Co.* case (as in the other cases cited and discussed hereinabove) this Court sustained a levy imposed expressly upon the privilege of using the highways of the State because it found that tax to be reasonable in amount and non-discriminatory against interstate commerce. In none of the cases discussed above, did the Court state that such taxes would be sustained only if they had some direct or proportionate relationship to the use of the State roads. Moreover, we most earnestly submit that the Supreme Court has never held that a tax imposed for a proper purpose, i. e. for the privilege of using the State's roads, must be geared to or have some measurable proportion to road use. To the exact contrary, this Court has expressly held, in an unbroken line of decisions, that there is only one test to be used in determining the constitutionality of a tax imposed for the privilege of using State roads; namely, whether that tax is reasonable in amount and non-discriminatory against interstate commerce.[8]

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[8] Other cases, not discussed in full in the text above, have sustained taxes imposed for the privilege of using the State's highways if those taxes were reasonable in amount and non-discriminatory against interstate commerce. The genesis of all of these cases is *Hendrick v. Maryland*, 235 U. S. 610, 59 L. Ed. 385 (1915). In that case, the appellant had been convicted before a Justice of the Peace of Prince Georges County for violating Chapter 207 of the Acts of 1910. Chapter 207, *supra*, provided, in part, that every motor vehicle operated in this State should have a certificate issued by the Commissioner of Motor Vehicles. To obtain this certificate, it was necessary to register the car in question, registration fees being fixed according to horsepower.

Appellants argue that the Maryland titling tax is invalid because its impact bares no measurable relationship

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i.e., $6.00 for twenty or less, $12.00 for twenty to forty and $18.00 in excess of forty. All monies collected under the provisions of the Act, with certain minor exceptions, were to be paid to the State Treasury to be used in the construction, maintenance and repair of the streets of Baltimore and roads built by the counties and the State.

The appellant was a resident of the District of Columbia and was, therefore, subject to the taxes imposed by Chapter 207, *supra*, if and when he used the highways of this State. On July 27, 1910, the appellant drove his car into Prince Georges County and while temporarily there was arrested on the charge of operating it upon a State highway without having procured the certificate of registration required by Chapter 207, *supra*. Before the Supreme Court, the appellant argued that the Maryland tax attempted to regulate interstate commerce, was arbitrary and confiscatory and was, therefore, unconstitutional.

The Supreme Court rejected the appellant's contention. In reaching its conclusion, the Court said at pages 623-624:

> "In view of the many decisions of this court there can be no serious doubt that where a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce."

The *Hendrick* case, *supra*, was reaffirmed a year later by the decision in *Kane v. New Jersey*, 242 U. S. 160, 61 L. Ed. 222 (1916). In *Clark v. Paul Gray, Inc.*, 306 U. S. 583, 83 L. Ed. 1001 (1939), the Supreme Court sustained a license tax imposed upon the privilege of transporting any vehicle through the State of California for the purpose of sale. The greater portion of the Court's opinion dealt with whether the contested act unlawfully discriminated against the vehicles owned by the taxpayer. In reaching its ultimate conclusion, however, the Court took occasion to point out that a State could levy a tax for the privilege of using the roads and that such a tax would be sustained if it were reasonable in amount. On this point, the Court said at page 598:

> "As the State has authority to charge a reasonable fee for the use of its highways, and as a classification of the traffic which the State has made for the purpose of fixing the fee is valid, the only remaining question is whether the fees which it has fixed must be deemed excessive."

See also *Clark v. Poor*, 274 U. S. 554, 71 L. Ed. 1199 (1927).

to the use of the State roads. For this proposition they rely principally upon *Interstate Transit, Inc. v. Lindsey*, 283 U. S. 183, 75 L. Ed. 953 (1931) and *Sprout v. South Bend*, 277 U. S. 163, 72 L. Ed. 833 (1928). We submit that neither of these cases sustains Appellants' proposition because in both there was entirely absent any allocation of proceeds for road use or any legislative declaration that the taxes were imposed for the privilege of using the State's roads. Thus, in each case, in testing validity by determining whether the tax was imposed on the privilege of using the roads or on interstate commerce as such, the court was obliged to determine whether the tax bore a "reasonable" relationship to road use. The only reason or necessity for inquiry into relationship to road use was the fact that there was no direct allocation of proceeds to the roads and no legislative declaration of imposition of a tax for the privilege of using the roads.

The tax before the Court in the *Interstate Transit* case, *supra*, was a privilege levy graduated according to carrying capacity, being a part of the Tennessee general revenue bill of 1927, which dealt with practically all taxes laid by the State except those relating to highways. The controverted measure was grouped under that portion of the general revenue bill which stated that each vocation, occupation and business named thereunder was declared to be a privilege and that for exercising that privilege a tax should be fixed and paid.

In approaching the problem, the Supreme Court reasoned that the tax in question was an exaction laid for the privilege of engaging in a specific type of business. This conclusion was reached not only because of the heading under which the Legislature had grouped the tax, but also because all of the taxes under that heading were

gauged to probable earning power. Moreover, the Court emphasized the fact that the proceeds of the tax were allocated to the general funds of the State. The Court concluded that the type of business upon which the tax was laid was the privilege of engaging in interstate commerce and that, as a result, the measure was unconstitutional.

It thus appears that the basic and underlying question before the Supreme Court in the *Interstate Transit, Inc.* case, *supra*, was whether the tax in question was imposed for the privilege of engaging in interstate commerce or was laid upon the privilege of using the State roads. In resolving the question of whether the tax was imposed for the privilege of using the State roads, the Court applied three tests, i.e. (1) whether the proceeds of the tax were allocated to road purposes (the Court found that they were not); (2) whether the Legislature had expressly declared the tax to be imposed for the use of the roads (the Court found that the Legislature had made no such declaration); and (3) whether the nature of the imposition indicated that it was imposed for the use of the State roads. And, *it was for the sole purpose of applying this last test* that the Court observed that the tax under consideration bore no relationship to the use of the State roads and was, therefore, unconstitutional. At 283 U. S. 188-189 and 75 L. Ed. 970-971, the Court said:

> "The conclusion that the tax challenged is laid for the privilege of doing business and not as compensation for the use of the highways is confirmed by contrasting Section 4 of the 1927 Act with those statutes which admittedly provide for defraying the cost of constructing and maintaining highways and regulating traffic thereon. * * *
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> "* * * In these statutes and in many later ones—prescribing additional fees for the registration and licensing of motor vehicles, imposing gasoline taxes,

laying a 1-mill road tax, and authorizing the issue of bonds for the construction of highways and bridges,—the legislature provided that the proceeds of the fees, taxes, and bonds, and of the tolls collected on bridges, should be set apart as state highway and bridge funds to be expended by the Commission exclusively for the construction and maintenance of highways or bridges. The absence in Section 4 of this provision, which characterizes almost every other Tennessee statute relating to the construction and maintenance of highways, or the regulation of motor vehicle traffic, is additional evidence that the present tax was not exacted for such purposes, but merely as a privilege tax on the carrying on of interstate business."

The conclusion is inescapable, therefore, that the statements of this Court relating to the relationship of a tax imposed upon interstate motor vehicles to the use of the roads *concerned only the question of whether that tax was imposed for the privilege of using the roads.* It must follow, therefore, that if the question of whether the tax was imposed for the privilege of using the State roads had been answered in the affirmative for some other reason (as for example by the allocation of the tax proceeds to road funds), this Court would have had no occasion to make the general statements relied upon by Appellants.

If the argument which we have made here is sound, we would expect this Court to disregard all of the factors implicit in the *Interstate Transit, Inc.*, case, *supra*, which dealt with the relationship of the tax to the use of State roads, if the proceeds of the tax in question were allocated directly to roads funds. As explained above, a consideration of the relationship of road use to the amount of the tax would become irrelevant in such a case, because the very thing that those considerations were used to disprove, i.e. that the tax was not laid for the privilege of using the

highways of the State, would have already been establish[illegible] to the contrary by the allocation of the tax proceeds t[illegible] State highway funds."

The hypothetical situation outlined above is grounded in reality in the case of *Hicklin v. Coney*, 290 U. S. 169, 78 L. Ed. 247 (1933). In that case, the State of South Carolina had imposed a tax on interstate motor bus operators based on carrying capacity. Unlike the Tennessee act construed in the *Interstate Transit, Inc.*, case, *supra*, the proceeds of the tax in *Hicklin v. Coney*, *supra*, were directly allocated to the maintenance of State highways. The tax was attacked as contravening the commerce clause of the Federal Constitution and in support of this argument the taxpayer relied heavily upon the case of *Interstate Transit, Inc., v. Lindsey*. In this connection, the argument was advanced that the tax in question bore no reasonable relationship to the use of the State roads and was, for this reason, unconstitutional.

The Supreme Court, in sustaining the constitutionality of the controverted tax, held that the levy was imposed for the privilege of using the State roads since the proceeds of the tax were allocated to the maintenance of public highways. Having determined that the tax was imposed for a proper purpose, i.e. for the privilege of using the State roads, the Supreme Court declared that the considerations implicit in the *Interstate Transit, Inc.*, case, *supra*, relative to the relationship between road use and the amount of

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"Thus, in *Central Greyhound Lines v. Mealey*, 334 U. S. 653, 92 L. Ed. 1633 (1948), this Court held unconstitutional a New York [illegible] tax on utility gross receipts as applied to an interstate bus operator, but expressly held that the tax would be valid if apportioned to mileage within New York. *The proceeds of this tax were not applicable to road construction and maintenance, and it was obviously not a tax upon the privilege of using the State's highways because it applied to all types of utilities.*

the tax were completely immaterial. In this connection the Court said at page 173:

> "Appellant insists that an undue burden is placed upon interstate commerce because the license fees are based on the 'carrying capacity' of the vehicles. The State court held that the fees 'are collected, as provided for by section 8517, for the purpose of maintaining the public highways over which such motor vehicles shall operate, as compensation for their use.' The statute provides for the segregation, for this purpose, of the moneys collected. See *Clark v. Poor*, 274 U. S. 554, 557, 71 L. ed. 1199-1201, 47 S. Ct. 702. In this view the fees are not open to the objection raised in *Interstate Transit, Inc., v. Lindsey*, 283 U. S. 183, 186, 188."

In *Sprout v. South Bend*, 277 U. S. 163, 72 L. Ed. 833 (1928), an ordinance of South Bend, Indiana, prohibited (with exceptions not here material) the operation of any motor bus within the city limits unless the bus was licensed by the city. The license fee varied with the seating capacity of each bus, the tax being $50.00 a year for buses which would seat twelve persons. The fee applied alike to buses operating wholly within the city and to those operating from points within to points without. The ordinance made no distinction between buses engaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce. The proceeds of the tax were *not* allocated by the terms of the ordinance to the maintenance of the city streets.

The taxpayer, who operated a motor bus, conducted a business which was primarily interstate in character. Upon his refusal to comply with the ordinance in question, the taxpayer was fined by the State courts. On appeal to the Supreme Court, the argument was advanced that

the ordinance placed an invalid burden upon interstate commerce.

The Supreme Court held that the license fee could not be sustained as an exercise of the police power which permitted, in certain cases, the regulation of interstate carriers. In this connection, the Court found that it did "not appear that the license fee here in question was imposed as an incident of such a scheme of municipal regulation; nor that the proceeds were applied to defraying the expenses of such regulation; nor that the amount collected under the ordinance was no more than was reasonably required for such a purpose."

The Court then observed that a State could, consistent with the commerce clause, impose a reasonable tax for the privilege of using its roads. In holding that the license fee in question was not such a tax, however, the Court said at page 170:

> "But no part of the license fee here in question may be assumed to have been prescribed for that purpose. A flat tax, substantial in amount and the same for buses plying the streets continuously in local service and for buses making, as do many interstate buses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways. And there is *no suggestion* either in the language of the ordinance or in the construction put upon it by the Supreme Court of Indiana, *that the proceeds of the license fees are, in any part, to be applied to the construction or maintenance of the city streets.*" (Italics supplied.)

The Court then held that the tax was, in substance, a levy on the privilege of engaging in interstate commerce, and that it was, as a result, repugnant to the commerce clause.

This Court will observe that the pivotal question in the *Sprout* case, *supra*, was (as was the question in *Interstate Transit, Inc., v. Lindsey, supra*) whether the tax in question was imposed upon the privilege of using the public highways. In both cases, this factor could not be established by the allocation of the tax proceeds. It became necessary in each case, therefore, to determine whether the tax was imposed upon the privilege of using the State's highways by determining whether the taxes bore some reasonable relationship to road use. And in each case, the Supreme Court found that the taxes were not geared to road use.

In the present case, we submit that the relationship of road use to the amount of the titling tax is completely irrelevant. This follows from the fact that the element of road use and its relationship to the tax is only important in determining whether the tax is imposed upon the privilege of using the State's roads. Since this question, i.e. whether the titling tax is imposed on the privilege of using the State highways, has already been answered in the affirmative in this case (because of the allocation of the tax proceeds to road funds) it becomes unnecessary to consider the relationship of road use to the amount of the tax.

E.

The Maryland Titling Tax is a Reasonable and Non-Discriminatory Levy.

We have pointed out in the preceding section of our brief that the Maryland titling tax has been expressly laid for the privilege of using the highways of this State. We have also pointed out that since the titling tax has been laid for a proper purpose, i.e. for the privilege of using the State roads, it is irrelevant that the tax is not geared to road use. Our argument has been that since the incidence of the titling tax is the privilege of using the State

roads, the tax should be held constitutional if it is reasonable in amount and non-discriminatory against interstate commerce. We submit that the tax here in question meet both of these last named tests.

It is of course immaterial to this case that Maryland charges other fees in connection with the use of its highways, as for instance the 1 30¢ "seat mile" tax exacted by Section 293 of Article 56 (intrastate passenger motor vehicles) and Section 218 of Article 81 (interstate passenger motor vehicles) of the Maryland Annotated Code (1947 Supp.).[10] This Court said in the *Aero Mayflower* case, *supra*, 332 U. S. at 506-507; 92 L. Ed. at 108-109:

> "It is of no consequence that the state has seen fit to lay two exactions, substantially identical, rather than combine them into one, or that appellant pays other taxes which in fact are devoted to highway maintenance. For the state does not exceed its constitutional powers by imposing more than one form of tax. Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 72 L. Ed. 551, 48 S. Ct. 230, supra; Dixie Ohio Exp. Co. v. State Revenue Commission, 306 U. S. 72, 83 L. Ed. 495, 59 S. Ct. 435, supra."

See also *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 85; 92 L. Ed. 1832, 1838 (1948).

In determining whether the titling tax is or is not excessive or discriminatory, this Court should keep in mind the cardinal rule to the effect that the legislative act is presumed to be constitutional. *O'Gorman and Young v. Hartford Fire Insurance Co.*, 282 U. S. 251, 75 L. Ed. 324 (1931). This rule applies with equal force to taxes imposed against interstate motor carrier operations. *Dixie Ohio Express Co. v. Commission*, 306 U. S. 72, 77, 83 L. Ed. 495, (1939). For this reason, we submit that the burden must fall to the Ap-

[10] See the Court of Appeals discussion of these Sections (R. 33-34).

pellants to show beyond a reasonable doubt that the tax here involved is unreasonable or discriminatory. Clearly that burden has not been met in the case at bar.

Whether the titling tax is unreasonable must, in the final analysis, depend upon whether the tax is an exorbitant exaction for the use of the Maryland roads. It is, of course, a familiar fact to every member of this Court that heavy buses do much to cause general disrepair and ultimate impassibility of highways.[11] In making the titling tax apply to interstate motor bus carriers and in allocating the proceeds of that tax to the construction and maintenance of State roads, the General Assembly merely attempted to exact from the very operators who contribute so largely to the deterioration of the Maryland roads a small payment for highway construction and maintenance.

When the titling tax is viewed in its proper setting, therefore, can it be said that the Appellants have demonstrated beyond a reasonable doubt that the amount of the tax is excessive? We submit that there are no facts alleged in any of the three petitions for mandamus which are before this Court which could be the basis for sustaining this view.

The principle point made by the Appellants in their attempt to prove the titling tax excessive is the fact that

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[11] This Court has, on several occasions, taken judicial notice of the fact that the highways of a State suffer immeasurably through use by heavy interstate motor vehicles. For example, in *Continental Baking Co. v. Woodring*, 286 U. S. 352, 76 L. Ed. 1155 (1932), the Court sustained a tax imposed by the State of Kansas which was levied at the rate of five-tenths mills per gross ton mile. In the course of its opinion, the Court said at pages 365-366:

> "* * * Motor vehicles may properly be treated as a special class because their movement over the highways, as this Court has said 'is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves.'"

some buses (notably those operated by Capitol) travel only a few miles in Maryland. Based upon this fact, Appellants' position is that such operators would pay a titling tax equivalent to that paid by a local operator (assuming each purchased the same type of bus), but since they operate over only a few miles of the State's roads, the tax is unreasonable.

The complete answer to this position is to demonstrate that it is based on the erroneous premise that a tax imposed for the privilege of using the roads must in amount be a quid pro quo for the number of times the privilege is availed of. The premise is entirely erroneous. If a tax is truly a tax for the privilege of using the roads (and it has been shown by the decisions of the Supreme Court that, if the proceeds of the tax are allocated specifically to road use, the tax is such a tax), the privilege may be availed of as freely as the taxpayer desires. He can use as much or as little of the State highway facilities as he chooses. It is not a fault of the tax that the Appellants chose to make a scant use of the State's roads.

As a matter of fact each of the Appellants use Maryland roads to a far greater extent than the amounts alleged in their respective petitions. For instance, as of April 1, 1947, Capitol had five authorized interstate routes in Maryland and 40 units or buses registered for use on these routes. As of April 1, 1948, Capitol had five authorized interstate routes in Maryland and 46 units registered for use on these routes; as of December 1, 1948, Capitol had ten authorized interstate routes in Maryland; as of April 1, 1949, it had ten authorized interstate routes in Maryland and 45 registered units for use on these routes. As of September 15, 1949, it had ten authorized interstate routes in Maryland. By far the greatest portion of each of these routes, except the one

alleged in their petition from Cincinnati to Washington, is within the State of Maryland and over State roads. Most of them are from the District of Columbia to points in Maryland. It thus appears that the 9 miles of Maryland roads alleged in Capitol's petition has no meaning whatever.

Furthermore, the registered units or buses of each Appellant may be and are used interchangeably upon their various routes. In other words, the bus referred to in Capitol's petition for use on the run from Cincinnati to Washington can be, and probably is, used to an equal extent over its other routes in Maryland. It is to be noted also that Capitol alleges only the one route (containing the least Maryland mileage) and alleges its gross receipts derived only from this route with no mention of its gross receipts from the other routes. It thus appears that an entirely distorted over-all impression is conveyed by the allegations of the petition.

Since the effective date of the tax in question, a period of about 29 months, Capitol has titled three $3,750 vehicles and five $25,000 vehicles, making a total tax of $2,730.80. It is again emphasized that these vehicles may be and are used interchangeably over Capitol's various above mentioned routes.

Similar situations obtain with respect to Greyhound and Red Star.[12]

In *Morf v. Bingaman*, supra, as we have pointed out above, the Court said at page 412:

"As the tax is not on the use of the highways but on the privilege of using them, without specific limitation

[12] The information hereinabove set forth is obtained from the official records of the Commissioner of Motor Vehicles.

as to mileage, the levy of a flat fee not shown to be unreasonable in amount, rather than a fee based on mileage, is not a forbidden burden on interstate commerce."

In Dixie Ohio Express Co v. Commission, supra, the Supreme Court found the tax to be a compensation for the privilege of using the highways of the State of Georgia in spite of the fact that by a specific Act of the Legislature all of the proceeds of the tax were allocated to rural post roads, *which were roads over which the taxpayer never travelled at all.*

In *Aero Mayflower Transit Co. v. Georgia Comm.*, 295 U. S. 285, 79 L. Ed. 1439 (1935) this Court answered precisely the same kind of argument under discussion here. In that case, the taxpayer, a private carrier for hire engaging in interstate commerce, contended that a Georgia tax levied against it was unreasonable since its use of the roads in Georgia was considerably less than other carriers. In discussing and answering this contention, the Court said at page 289:

"The appellant urges the objection that its use of roads in Georgia is less than that by other carriers engaged in local business, yet they pay the same charge. The fee is not for the mileage covered by a vehicle. There would be administrative difficulties in collecting on that basis. *The fee is for the privilege for a use as extensive as the carrier wills that it shall be.* There is nothing unreasonable or oppressive in a burden so imposed." (Italics supplied.)

We submit that the Appellants have not met the burden cast upon them in this case by showing merely that they use only a few miles of State roads in their operations.

The Appellants argue that the titling tax is unreasonable because a similar tax might be imposed by other States. However, this argument completely overlooks the fact that

flat taxes have been sustained many times by the Supreme Court and that each of these taxes was open to the same criticism. For example, every state in the nation could impose a flat tax similar to that passed upon in the recent decision of *Aero Mayflower Transit Co. v. Board of Railroad Commissioners*, 332 U. S. 495, 92 L. Ed. 99 (1947), and if a motor vehicle operator passed through each, he would be required to pay the tax of all. Moreover, it is no objection to the reasonableness of a levy against interstate motor vehicle operations that the tax is a flat amount. As the Supreme Court has said in the *Aero Mayflower Transit Co.* case, *supra*, at page 506, footnote 19:

> "Appellant claims that the $15 minimum fee is unreasonable since it is roughly ten times greater than the tax that would be required if the percentage standard provided in the statute were applied. To accept appellant's position would mean that a state could never impose a minimum fee, *but would have to adjust its taxes to the inevitable variations in the use of the highways made by various carriers.* The Federal Constitution does not require the state to elaborate a system of motor vehicle taxation which will reflect with exact precision every graduation in use. In return for the $15 fee appellant can do business grossing $3,000 per vehicle annually for operations on Montana roads. *Appellant was not wronged by its failure to make the full use of the highways permitted.*" (Italics supplied.)

The Maryland titling tax is not annual. It is imposed *but once* and its payment permits the taxpayer to use the highways with the vehicle upon which the tax has been paid as extensively and for as long a time as he desires. It is fair to assume that the average life of a bus is six years; perhaps it is even ten years. If we test the taxes which are involved in the instant case by considering the titling tax, paid in a lump sum, as pro-rated over the useful life of the vehicle, we find that, in the case of Capitol the total

tax is $505.17, or at a life of six years approximately $86.00 per year, and at the life of ten years approximately $50.00 per year. In the case of Greyhound, where the total tax is $580.00, at a six year pro-rate the tax would be $96.00 annually and at a ten year pro-rate, $58.00 annually. In the case of Red Star, where the total tax is $372.75, a six year pro-rate would give an annual tax of $62.00 and a ten year pro-rate would be approximately $37.00 a year. It is very difficult to argue seriously that any of these amounts, considered as an annual tax, are unreasonable exactions for the privilege of as an extensive use of the roads of Maryland as the taxpayer cares to exercise. This conclusion is fortified by comparison with many taxes which have heretofore been sustained by the Supreme Court as annual taxes. For example, in *Dixie Ohio Express Co. v. Commission, supra*, the Court held the Georgia maintenance tax valid as an excise for the privilege of the use of the roads despite the fact that it was an annual levy, imposed at the rates of $50.00 on each ton-and-one-half vehicle, $75.00 on each two-ton vehicle and $50.00 on each trailer and that it would cost the taxpayer-litigant approximately $6,000.00 a year.

The $6,000.00 paid by the taxpayer in the case last cited would permit the titling of $300,000.00 worth of motor buses each year in Maryland by any of the Appellants in this case. We do not understand that the activities of the Appellants in this State will require such extensive purchases.

These computations are admittedly conjectural; but they are not too far from accurate to show that the Maryland titling tax, payable but once in a bus's lifetime, is reasonable by comparison. At any rate, Appellants have not demonstrated that it is unreasonable, and the burden is upon

them. *Dixie Ohio Express Co. v. Commission, supra*, 306 U. S. at 77, 83 L. Ed. at 499.

The Court of Appeals found and Appellants have admitted that this is an "industry suit"; that there is no distinction between the three cases which would justify a ruling different in one case from another (R. 33). No contention is made that the tax, as applied to any particular one of the Appellants, as distinguished from the others, is unreasonable or discriminatory. The application of the tax as a whole to buses traveling in interstate commerce is attacked, regardless of the extent of operations in Maryland by any particular bus or carrier. Appellants' emphasis upon the alleged difference in Maryland line-miles of their three routes, therefore, seems immaterial to the case as presented. Neither of the three Appellants has alleged any facts which show that the "titling tax" is an unreasonable burden, financial or otherwise, upon its interstate operations. As shown above, neither of them has alleged any facts which show that the titling tax is as to it greater or more burdensome than other State taxes upon interstate motor carriers which have been upheld by this Court. *Aero Mayflower Transit Co. v. Board of R. R. Commissioners, supra*, 322 U. S. at 507, 92 L. Ed. at 109. In fact it is not even shown that the tax is more burdensome as to any one Appellant than it is as to the others, for we cannot tell from the petitions how many buses each Appellant operates or proposes to operate in Maryland.

To suggest "disparity of impact" of the tax, Appellants stress the fact that Capitol's route uses only 9 miles of Maryland roads whereas the other Appellants use 41 and 64 miles respectively. But the conclusion does not follow; for Capitol may, and judging by its gross receipts (R. 10) probably does, make for greater use of its 9 miles than do the other two of their respective routes. Further, there is

no necessary connection between number of trips or miles and number of buses; and it is the latter which determines the ultimate tax burden.

In any event, isolated cases of "disparity of impact" could be no objection, so long as the tax does not discriminate against interstate commerce. That it does not, is evident. The tax applies with equal force to all motor vehicles registered in Maryland, including those of intrastate and interstate carriers alike. Thus, it will be seen that interstate commerce is not singled out as the object of the levy to the exclusion of those carriers similarly situated who engage in local traffic. Since this is the type of discrimination prohibited by the commerce clause of the Federal Constitution, it follows, we submit, that the titling tax does not discriminate against interstate commerce.

Several cases decided by this Court have held that the vice characteristic of statutes which discriminate against interstate commerce is the fact that that type of commerce is selected to the exclusion of all other types for the purposes of a tax. Measures falling short of such conscious discrimination, however, have been sustained in a great majority of the cases. For example, in *Interstate Busses Corporation v. Blodgett*, 276 U. S. 245; 72 L. Ed. 551 (1928), this Court sustained a mileage tax levied against the operations of interstate carriers alone, where an entirely different type of tax was levied against intrastate carriers. In *Aero Mayflower Transit Co. v. Board of Railroad Commissioners*, 332 U. S. 495, 92 L. Ed. 99 (1947), the Supreme Court in sustaining the constitutionality of two Montana taxes levied at flat rates against interstate carriers stated the general rule, as follows, at page 501:

> "Neither exaction discriminates against interstate commerce. Each applies alike to local and interstate operations. Neither undertakes to tax traffic or move-

ments taking place outside of Montana or the gross returns from such movements, or to use such returns as a measure of the amount of the tax. Both levies apply exclusively to operations wholly within the State or the proceeds of such operations, although those operations are interstate in character."

We submit that since the Maryland titling tax applies alike to local and interstate vehicles, it is not discriminatory.

CONCLUSION

Upon the entire record in this case, it is our earnest contention that the Appellants have failed to meet the burden of proving that the Maryland titling tax is unreasonable in amount or discriminatory against interstate commerce. To the exact contrary, the conclusion is inescapable that the tax under question is no greater than those which have been previously sustained by the Supreme Court of the United States. Since the titling tax is not excessive in amount, nor discriminatory, and because it is levied solely upon the privilege of using the highways of this State, we maintain that the tax in no way contravenes the commerce clause of the Federal Constitution and that its constitutionality should be sustained. For these reasons, the decrees appealed from ought to be affirmed.

Respectfully submitted,

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APPENDIX

ANNOTATED CODE OF MARYLAND (1947 Supp.), Article 66½

21. (Vehicles Subject to Registration—Exceptions.) (a) Every motor vehicle, trailer, and semi-trailer when driven or moved upon a highway shall be subject to the registration and certificate of title provisions of this Article except:

(1) Any such vehicle driven or moved upon a highway in conformance with the provisions of this Article relating to manufacturers, transporters, dealers, lien holders, or non-residents or under a temporary registration permit issued by the Department as hereinafter authorized;

(2) Any implement of husbandry whether of a type otherwise subject to registration hereunder or not which is only incidentally operated or moved upon a highway;

(3) Any special mobile equipment as herein defined;

(4) All motor vehicles owned and used by the Government of the United States, State of Maryland, or any city, town, village or county of this State, and all motor vehicles owned and used for personal or official purposes by accredited consular or diplomatic officers of foreign governments, which officers are nationals of the state by which they are appointed and are not citizens of the United States and by any incorporated volunteer fire company incorporated in this State or rescue squad and used for fire-fighting or ambulance purposes are hereby exempted from the provisions of this sub-title requiring the payment of registration fees, but all such vehicles shall display identification markers approved by the Commissioner of Motor Vehicles.

(5) Any motor vehicle and trailer, known as the "40-8 box car", and owned and operated exclusively for social or charitable purposes by any voiture of the Forty and Eight of the American Legion, Department of Maryland, is hereby exempted from the provisions of this sub-title requiring the payment of registration fees, but every motor

vehicle and trailer shall display an identification marker bearing the number of the organization and the number of the local voiture (reading 40-8—local number).

22. (Application for Registration and Certificate of Title.). (a) Every owner of a vehicle subject to registration hereunder shall make application to the Department for the registration thereof and issuance of a certificate of title for such vehicle upon the appropriate form or forms furnished by the Department and every such application shall bear the signature of the owner written with pen and ink and said signature shall be acknowledged by the owner before a person authorized to administer oaths and said application shall contain:

(1) The name in full, bona fide residence and mail address of the owner, or business address of the owner if a firm, association or corporation.

If the owner is an individual using a trade name, the correct name of the owner, with his address, must be furnished.

If the owner is a partnership or a joint enterprise, the correct names and addresses of the partners or joint enterprisers must be furnished.

If the owner is an unincorporated association or joint stock company, as contemplated in Section 123, of Article 23, of the Maryland Code (1939 Edition), there shall be designated the name and address of a resident agent, who shall be authorized to accept service in any law suit arising out of the operation of the motor vehicle being registered.

(2) A description of the vehicle, including insofar as the hereinafter specified date may exist with respect to a given vehicle, the make, model, type of body, the number of cylinders, the engine number and the serial number of the vehicle.

(3) A statement of the applicant's title to and of all liens or encumbrances upon said vehicle and the names and ad-

dresses of all persons having any interest therein and the nature of every such interest.

(4) Such further information as may reasonably be required by the Department to enable it to determine whether the vehicle is lawfully entitled to registration and the owner entitled to a certificate of title.

(b) When such application refers to a new vehicle purchased from a dealer out of the State the application shall be accompanied by a sworn statement or a sworn bill of sale from the dealer from whom the purchase was made, showing any lien retained by the dealer.

(c) If the body design of any vehicle is changed from that set forth in the original title and registration, such fact shall be immediately communicated to the Department of Motor Vehicles, and the owner of any such vehicle shall apply for a new title and registration applicable to the changed description of such vehicle.